TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~376~~ 102.

JOHN WOODS & SONS, PLAINTIFFS IN ERROR,

vs.

FRANK CARL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED AUGUST 18, 1905.

(19,878.)

(19,878.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 376.

JOHN WOODS & SONS, PLAINTIFFS IN ERROR,

vs.

FRANK CARL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print.
Petition for reversal	1	1
Assignment of errors	2	1
Caption	3	2
Petition for writ of error	4	2
Return to writ of error	5	3
Writ of error (copy)	6	3
Bond on writ of error	7	4
Waiver of citation	8	5
Transcript from circuit court of Pulaski county	9	5
Caption	9	5
Complaint	10	5
Bond for costs	11	6
Summons issued and served	12	6
Order filing answer	12	7
Answer	13	7
Order of continuance	14	7
Trial	14	8
Verdict	14	8
Judgment	14	8
Order overruling motion for new trial, &c	15	8
Motion for new trial	16	9
Order filing bill of exceptions	16	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1905.

	Original.	Print.
Bill of exceptions	17	9
Evidence for defendant	18	10
Testimony of Frank Carl	18	10
Contract, September 6, 1901	18	10
Evidence for plaintiff	23	13
Deposition of W. F. Woods	23	13
Note of Frank Carl, September 6, 1901	29	16
Testimony of C. G. Human	30	17
Instructions asked by plaintiff and refused by the court	31	17
Court's instruction to jury	31	17
Submission	31	17
Verdict	31	17
Motion for new trial overruled	32	17
Judge's certificate to bill of exceptions	32	18
Clerk's certificate to transcript	33	18
Fee bill	33	18
Prayer for appeal and allowance	34	19
Waiver of summons on appeal and entry of appearance for appellee	34	19
Order submitting cause	35	19
Judgment	36	20
Opinion	37	20
Bill of costs	44	25
Clerk's certificate	45	25

1 In the Supreme Court of the United States.

JOHN WOODS & SONS, Plaintiffs in Error,
vs.
FRANK CARL, Defendant in Error.
} In Error to the Supreme Court of the State of Arkansas.

Petition.

Now come John Woods & Sons Plaintiffs in error and pray that the judgment rendered against them and in favor of Frank Carl defendant in error, in the Supreme Court of the State of Arkansas, as shown by the transcript in said cause herewith filed in this court, be reversed, annulled and set aside and that said cause may be remanded to the Supreme Court of the State of Arkansas with directions to reverse the judgment therein complained of and remand said cause to the Pulaski Circuit Court of said State with instructions to render judgment therein in favor of the plaintiffs in said cause, John Woods & Sons and against the defendant Frank Carl and your petitioners will ever pray.

H. C. MECHEM,
Att'y for Plaintiff in Error.

2 In the Supreme Court of the United States.

JOHN WOODS & SONS, Plaintiffs in Error,
vs.
FRANK CARL, Defendant in Error.

Assignment of Errors.

Now come John Woods & Sons, plaintiffs in error, and allege that in the record and judgment in this cause divers errors committed against them appear, to-wit;—

First. The Court below erred in holding that the contract upon which this suit is based was a contract for the sale of a patent right or patent right territory.

Second. The Court below erred in holding that Sections 513, 514, 515 and 516 of Kirby's Digest of the Statutes of Arkansas were not unconstitutional and void because a direct interference with the exclusive power of Congress to create patent rights and prescribe the terms of transferring the same.

Third. The Court below erred in refusing to hold that Sections, 513, 514, 515 and 516 of Kirby's Digest of the Statutes of Arkansas were void as an invasion of the rights of a patentee under the United States.

Fourth. The Court below erred in refusing to hold that Sections 513, 514, 515 and 516 of Kirby's Digest of the Statutes of Arkansas were in violation of the Fourteenth Amendment to the Constitution of the United States, in that — excepts from its operation "merchants

and dealers who sell patented things in the usual course of business."

H. C. MECHEM,
Att'y for Plaintiffs in Error.

3 STATE OF ARKANSAS, } *sct:*
In the Supreme Court, }

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November A. D. 1904 at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the First day of May 1905, a day of said term: and subsequent days

JOHN WOODS & SONS, Appellant-, }
v. }
FRANK CARL, Appellee. }

Appeal from Pulaska Circuit Court.

Transcript from the record and proceedings on error to Supreme Court of the United States.

4 UNITED STATES OF AMERICA, }
State of Arkansas. }

To the Honorable Joseph M. Hill, Chief Justice of the State of Arkansas:

The petition of John Woods and Sons respectfully shows that on the — day of May, A. D. 1905, the Supreme Court of the State of Arkansas rendered a final judgment against your petitioner in a certain cause wherein your petitioners were plaintiffs and Frank Carl was defendant for — Dollars Costs and awarded execution thereon, as will appear by reference to the record and proceedings in said cause; And that said court is the highest court of said State in which a decision in said suit could be had. And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by Writ of Error, under Section 709 of the Revised Statutes of the United States, because in said judgment the said Supreme Court of the State of Arkansas denied the contention of your petitioners in said suit that Sections 513, 514, 515 & 516 of Kirby's Digest of the Statutes of the State of Arkansas were unconstitutional and void as an infringement upon the rights granted to the owner of a patent by the Constitution and Laws of the United States of America and also because said legislation denied to the owner of a patent right the equal protection of the laws as defined and protected by the last sentence of Section 1 of the 14th Amendment to the Constitution of the United States, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioners pray the allowance of a Writ of Error

returnable into the Supreme Court of the United States and for citation and supersedeas; and your petitioner- will ever pray &- &-.

JOHN WOODS & SONS, Petitioners.
H. C. MECHEM,
Attorney for Petitioners.

Let the Writ of Error issue as prayed

JOSEPH M. HILL,
Chief Justice of the Supreme Court
of the State of Arkansas.

Filed July 26, 1905.

P. D. ENGLISH, Clerk.

5 [Endorsed:] Jno. Woods & Sons vs. Frank Carl Petition for Writ of Error to U. S. Sup. Ct.

Return on Writ of Error.

STATE OF ARKANSAS, }
In the Supreme Court. }

I Peyton D. English clerk of the Supreme Court of the State of Arkansas hereby certify that in obedience to the mandate of the within Writ of Error, a duly certified Transcript, under the seal of said Court of the record and proceedings in the case therein stated with all things concerning the same, is hereto attached.

In testimony whereof I, hereto set my hand as such Clerk of said Supreme Court and affix the Seal of said Court at my office in the City of Little Rock, the capital of said State, this the 5th day of August A. D. 1905.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH, Clerk.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme court before you, being the highest court of law of the said State in which a decision could be had in the suit between John Woods & Sons Appellants and Frank Carl Appellee wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution, treaties and laws of the United States and the decision was in favor of such their validity; A manifest error has happened to the great damage of the said John Woods and Sons Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in its behalf do command you, if judg ment be therein given, that then under your seals, distinctly an openly, to send the record and proceedings aforesaid, with all thing concerning the same to the Supreme Court of the United States, to gether with this writ, so that you have the same at Washington, o the first Monday of September next, in the said Supreme Court, t be then and there held, that, the record and proceeding aforesai being inspected, said Supreme Court may cause further to be don therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller Chief Justice of th said Supreme Court the 26th day of July in the year of Our Lor One Thousand Nine Hundred and Five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH M. HILL,
Chief Justice of the Supreme Court of Arkansas.

Filed July 26th 1905.

P. D. ENGLISH, Clerk.

[Endorsed :] Jno. Woods & Sons vs. Frank Carl. Writ of Erro

7 Know all Men by these Presents, That we, John Woods & Sons, as principals, and J. W. Hansell, as sure*ties*, are hel and firmly bound unto Frank Carl in the full and just sum of Tw Hundred & fifty dollars, to be paid to the said Frank Carl his ce tain attorney, executors, administrators, or assigns: to which pay ment, well and truly to be made, we bind ourselves, our heirs, ex ecutors, and administrators, jointly and severally, by these present Sealed with our seals and dated this — day of July, in the yea of our Lord one thousand nine hundred and five.

Whereas, lately at a term of the Supreme Court of the State Arkansas in a suit depending in said Court, between said Joh Woods & Sons as appellants and said Frank Carl as appellee a judg ment was rendered against the said John Woods & Sons and th said John Woods & Sons having obtained a writ of error and file a copy thereof in the Clerk's Office of the said Court to reverse th judgment in the aforesaid suit, and a citation directed to the sai Frank Carl citing and admonishing him to be and appear at a Su preme Court of the United States, at Washington, within 30 day from the date thereof.

Now, the condition of the above obligation is such, That if th said John Woods & Sons shall prosecute said writ of error to effec and answer all damages and costs if they fail to make their ple good, then the above obligation to be void ; else to remain in ful force and virtue.

JOHN WOODS & SONS, [SEAL.]
By JOHN WOODS. [SEAL.]
J. W. HANSELL. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
JOSEPH M. HILL,
Chief Justice of the Supreme Court
of the State of Arkansas.

Filed July 26th 1905.

P. D. ENGLISH, Clerk.

[Endorsed:] John Woods & Sons Appellants vs. Frank Carl Appellee. Bond for Costs &c.

8 In the Supreme Court of the United States.

JOHN WOODS & SONS, Plaintiffs in Error,
vs.
FRANK CARL, Defendant in Error.
} Error to the Supreme Court of Arkansas.

Waiver of Citation and Appearance of Defendant in Error.

The above-named defendant in error, Frank Carl, waives the issue of a citation in the foregoing cause and enters his appearance in said Court and cause.

RATCLIFFE & FLETCHER,
Attorneys for Frank Carl, Defendant in Error.

[Endorsed:] John Woods & Sons vs. Frank Carl Waiver of Citation.

9 Transcript from Circuit Court.

Pleas Before the Hon. Edw. W. Winfield, Judge of the Pulaski Circuit Court, Second Division, on the 5th day of March, 1903, in the Case of

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant.
} Complaint at Law.

10 Complaint.

In the Pulaski County Circuit Court.

JOHN WOODS & SONS, a Partnership Composed of John Woods, W. G. Lee Woods, and W. F. Woods, Plaintiffs,
vs.
FRANK CARL, Defendant.
} Complaint at Law.

Now come John Woods & Sons, a partnership composed of John Woods, W. G. Lee Woods, and W. F. Woods, plaintiffs, and complain of the defendant, Frank Carl, and for cause state:

That on September 6th. 1901, defendant executed and delivered to the Human Gas Company the following promissory note, to wit:

"$1300.00 LITTLE ROCK, ARKS., *Sept.* 6, 1901.

"Thirty days after date I promise to pay to the order of Human Gas Co. Thirteen Hundred Dollars, For Value received, negotiable and payable, without defalcation or discount, at the Bank of Commerce, of Little Rock, Arkansas, with interest from date at the rate of ten per centum per annum till paid. The makers and endorsers of this note hereby severally waive presentment of payment, notice of non-payment and protest.

"Due October 6th. 1901.

(Signed) FRANK CARL."

That before maturity of the said note the Human Gas. Company for a valuable consideration received from these plaintiffs, endorsed, transferred and delivered said note to these plaintiffs, said endorsement on the back of said note being in words and figures following:

"Pay to the order of John Woods & Sons,

(Signed) "HUMAN GAS CO.,
"HEBERER."

That plaintiffs are the owners and holders of said note; that the same is long past due and wholly unpaid. Plaintiffs pray judgment for the sum of $1300.00 and interest, costs and other relief.

MECHEM & BRYANT,
Attorneys for Plaintiffs.

Endorsed on back: Filed and Writs issued Decbr. 24th. 1901, J. J McEvoy, clk. By H. G. Dale, D. C.

11 Bond for Costs.

In the Pulaski Circuit Court.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant. } Bond for Costs.

We undertake that the plaintiffs, John Woods & Sons, shall pay to the defendant, Frank Carl, and to the officers of the Court, all costs that may accrue to them in this action, either in the Pulaski County Circuit Court or any other Court to which it may be carried.

JOHN WOODS & SONS,
By MECHEM & BRYANT, Att'ys.
J. W. HANSEL.
WILL J. ECHOLS.

Endorsed on back: Filed January 3rd. 1902, with the Clerk. J. J. McEvoy, Cl'k. By W. Ross McCain, D. C.

12 Summons.

Issued Dec'b'r 24th, 1901. Served December 24th, 1901.

On March 5th. 1902, a day of the March Term 1902, the following proceedings were had, to wit:

Order Filing Answer.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant. } 171.

Comes the defendant by his attorneys, Ratcliffe & Fletcher and by leave of court file- herein his answer.

13 Answer.

In Pulaski Circuit Court, Second Division.

JOHN WOODS & SONS, Composed of John Woods, W. G. Lee Woods, and W. F. Woods, Plaintiffs,
vs.
FRANK CARL, Defendant. } No. 374.

Comes the defendant, Frank Carl, by Ratcliffe & Fletcher, his attorneys, and for answer to the complaint of the plaintiffs John Woods, W. G. Lee Woods, and W. F. Woods, partners under the name of John Woods & Sons—says—

That the consideration of the note sued on herein was the sale to him by the said Human Gas Co. of a certain patented machine called the Human Automatic Acetyline Gas Generator, and of the right to the patent therefor in Arkansas, and the said note not being executed in the form required by law is absolutely void—

He also denies that the said plaintiffs are holders for value of the said note—

Wherefore he prays to be discharged herefrom with his reasonable costs and for other relief—

RATCLIFFE & FLETCHER,
Attorneys for Defendant.

Endorsed on back: Filed March 5th. 1902. J. J. McEvoy, cl'k. By W. Ross McCain, D. C.

14 On May 28th, 1902, a day of the March Term 1902, the following proceedings were had to wit:

Order of Continuance.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant. } 171.

Now on this day this cause was continued by the court on account of the absence of plaintiffs' attorneys.

On May 12th, 1903, a day of the March Term 1903, the following proceedings were had, to wit:

Trial.

JOHN WOODS & SONS, a Partnership Composed of John Woods, W. G. Lee Woods, and W. F. Woods, Plaintiffs,
vs.
FRANK CARL, Defendant. } 93.

Comes the plaintiffs by their attorneys, Mechem & Bryant and the defendant by his attorneys, Ratcliffe & Fletcher and this cause being called for trial and both parties announcing ready, thereupon comes a jury of twelve good and lawful men, qualified electors of Pulaski County and after hearing the opening statement of council, the evidence in the case and the instructions of the Court, the jury retired in charge of the Sheriff to consider of their verdict and after due deliberation returned into court the following verdict:

Verdict.

We the jury find for the defendant.

R. W. WALKER, Foreman.

Judgment.

It is therefore considered, ordered and adjudged by the Court that the plaintiffs take nothing for their cause of action, that the defendant go hence discharged hereof and have and recover of John Woods, W. G. Lee Woods & W. F. Woods composing the partnership of John Woods & Sons, and of J. W. Hansel and Will J. Echols, sureties on their cost bond all his costs herein expended and have execution therefor.

15 On May 12th, 1903, a day of the March Term 1903, the following proceedings were had, to wit:

Order Filing Motion for a New Trial and Overruling Same.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant. } 93.

Comes the plaintiffs by their attorneys, Mechem & Bryant and by leave of Court file herein their motion for a new trial and the said motion now coming on for final disposition, the Court being well and duly advised doth order and adjudge that said motion be and the same is hereby overruled, to which ruling of the Court plaintiffs at the time excepted and were allowed until the first day of next term for filing herein their Bill of Exceptions.

16 Motion for New Trial.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant.

Motion for New Trial.

Now come the plaintiffs and moved the court to set aside the verdict in this case rendered, and grant a new trial for the reason that the court erred,

1st. In overruling plaintiffs' motion to strike out the testimony of defendant as to the character of the consideration for the note in suit, and also his evidence as to territory.

2nd. In overruling plaintiffs' request to direct the jury to find for them.

3rd. In instructing the jury as follows: "If you find that this note was given for a patent right machine or territory you will find for the defendant; if not you will find for the plaintiffs.

4th. Because said verdict is contrary to the law and against the evidence.

MECHEM & BRYANT,
Attorneys for Plaintiffs.

Endorsed on back: Filed May 12th., 1903, J. J. McEvoy, Clerk.

On September 28th. 1903, a day of the September term 1903, the following proceedings were had, to wit:

Order Filing Bill of Exceptions.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant. } 93.

Come the plaintiffs by their attorneys Mechem & Bryant and presents to the Court their bill of exceptions and the same being signed and in all things approved is ordered filed by the Clerk and made a part of the record in this case.

17 Bill of Exceptions.

In the Pulaski Circuit Court, Second Division.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant.

Bill of Exceptions.

Be it Remembered, that the 12th. day of May 1903, it being a day of the March Term, 1903, of the Pulaski Circuit Court, in the trial of above mentioned cause in said court, the Hon. Edward W. Winfield, Judge Presiding, the following proceedings were had, to wit: The cause coming on to be tried a jury was selected and duly empaneled.

The defendant to maintain the issues on his part introduced the following witnesses, to wit:

18 Under the pleadings in the case the burden of proof is upon the defendant.

Testimony of Frank Carl for Defendant.

FRANK CARL, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. You signed the note in controversy here in this case?
A. Yes sir.
Q. State what was the consideration for that note?
A. One half interest in the right to do business in this State.
Q. What was the contract you had for?
A. For the manufacture and sale of Acetyline Gas.
Q. Did they have any business here at that time?
A. None.
Q. What did they have?
A. Mr. Human was here and had a special machine and operated it to show the principle upon which it worked.
Q. State whether or not that was a patented machine?
A. Yes sir, it was so stated on the machine, and Mr. Human told me himself that he had the patent for quite a number of States.
Q. Including this State?
A. Yes sir.
Q. Did you enter into a written contract with him at the time you gave this note?
A. Yes sir.
Q. This is the contract is it?
A. Yes sir, and it reads as follows:

STATE OF ARKANSAS, }
County of Pulaski. }

Know all men by these presents, that we, the Human Gas Co. of San Antonio, Texas, parties of the first part, have this day

19 sold, and by these presents do sell to Frank Carl, of Little Rock, Arkansas, party of the second part, an undivided half interest in our business to be known as the Human Gas Co. of Arkansas, for the sale and manufacture of the Human Automatic Acetylene Gas Generator in the said State of Arkansas, and in no other place or places, also rent lease or installing Municipal Gas Plants, by said Human Gas Co. of Arkansas, also the sale of all kinds of gas fixtures, pipe, fittings, etc. and everything pertaining to the said gas business. The Human Gas Co., parties of the first part, and Frank Carl, party of the second part are to share and share alike in the expenses and profits of the business, derived from any source whatsoever. The Human Gas Co. parties of the first part, hereby agree and bind ourselves to assist Frank Carl, party of the second part, until such time as Frank Carl feels competent to conduct said business without our assistance. The Human Gas Co. further agrees that the said Frank Carl, party of the second part, shall handle all

moneys of the Human Gas Co. of Arkansas, also the said Frank Carl has the consent of the Human Gas Co. to apply all net earnings derived from said business to his own personal account, until said net earnings shall have been equal to the amount of the investment of the said Frank Carl hereinafter mentioned. The Human Gas Co., parties of the first part, guarantees the said Frank Carl, party of the second part, the amount of his investment back on or before January 1st. 1902, A. D. In the event the net earnings of the Human Gas Co. *has* not been sufficient to cover the amount of the said Frank Carl's investment by January 1st. 1902 A. D. then the Human Gas Co. hereby agrees and binds ourselves to relinquish all of our right, title, and interest in and to the State of Arkansas, and all the business, moneys, credits, etc. done up to the 1st. of January 1902 and give said Frank Carl a good deed and manufacturer's right in and to the said State of Arkansas for the sale and manufacture of the Human Automatic Acetylene Gas Generator. In the event that the net earnings of the business shall not be sufficient to cover the amount of the investment made by Frank Carl, party of the second part, then the said Frank Carl hereby agrees to let the Human Gas Co., parties of the first part, have the privilege to make up the shortage out of their personal moneys. The consideration of this contract is Fifteen Hundred Dollars to us in hand paid, the receipt of which is hereby acknowledged.

Witness our hands this the sixth day of September 1901 A. D.

HUMAN GAS CO.,
By HUMAN.
FRANK CARL.

Endorsed: Filed May 12, 1903, J. J. McEvoy, Clerk."

Q. That contract recites a consideration of $1500.00, was this $1300.00 note taken into consideration as a part of that $1500.00?

A. Yes sir.

Q. How was the other $200.00 paid, or to be paid?

A. It was paid in cash. They left it in my hands as a part of the money put up. They were to put up $200.00 and I $200.00, to be used in manufacturing the machines and getting them on the market.

Q. Selling them you mean.

A. Yes sir.

Q. Then you were to put up $200.00 more for the manufacture of these machines and putting them upon the market?

A. Yes sir.

Q. State whether or not there was any other business connected with that you were going in?

A. No, there was not.

Q. That was the only business?

A. Yes sir.

Q. Was that the only business you attempted to do under that contract?

A. Yes sir.

21 Q. Was there any other consideration for this note, other than you have stated?

A. That is all.

Q. What became of the machine which was on exhibition here at that time?

A. I paid Mr. Human for that.

Q. You bought that after the written contract was entered into?

A. Yes, and some other material, amounting to $40.00 or $50.00, I do not remember the amount.

The plaintiffs moved the court to strike from the record the testimony of the defendant as to the character and consideration of the note in suit, and also his evidence as to territory, which motion was by the court overruled, to which ruling of the court in overruling said motion the plaintiffs at the time excepted, and asked that their exceptions be noted of record.

Cross-examination:

Q. As I understand you the sole consideration for this note was the contract that has been introduced in evidence here?

A. Yes sir.

Q. You had no other contract save this written contract?

A. No other written contract. We had a verbal contract.

Q. Under this contract you entered into the business here in Arkansas contemplated by the written contract, and carried it on for some time?

A. Yes sir.

Redirect examination:

Q. When you say the business contemplated by the written contract what do you mean?

22 Objected to by the plaintiffs for the reason that the contract speaks for itself, which objection was by the court sustained.

Q. Did you and the Human Gas Co. at the time this contract was entered into contemplate doing anything more than to manufacture and sell the gas generators in Arkansas?

Objected to by plaintiffs, which objection was by the court overruled to which ruling of the court in overruling said objection the plaintiffs at the time excepted, and asked that their exceptions be noted of record.

A. No sir.

This was all the testimony on the part of the defendant.

23 The plaintiffs to maintain the issues upon their part introduced the following witnesses:

The plaintiffs offered to introduce in evidence the deposition of

W. F. Woods, to the introduction of which the defendant objected, which objection was by the court overruled.

Testimony of F. W. Woods for Plaintiffs.

"In the Circuit Court of Pulaski County, Ark.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant.

Interrogatories to be Propounded to W. F. Woods, a Witness for Plaintiffs.

1. State your name, age, occupation and residence.
2. Do you know which member of the firm of John Woods & Sons transacted the business with Human Gas Co., by which said plaintiffs became the holders of the note in suit in this case; if so state which?
3. If you answer the last interrogatory by saying that you transacted said business with Human Gas Co. state fully and in detail the circumstances under which you received said note, also whether after receiving said note you advanced further funds to said Human Gas Co., and if so when and how much?
4. How much if anything does the Human Gas Co. now owe plaintiffs for which this note is held as security?
5. State any other matter or thing material to the rights of either party to this controversy.

MECHEM & BRYANT,
Att'ys for Plaintiffs.

24 Cross Interrogatory.

First. State what, if any, connection you have with the Human Gas Co.

Second. State to what extent you have dealt with the Human Gas Co.

RATCLIFFE & FLETCHER,
Attorneys for Defendant.

March 14th 1902.

We agree that the above interrogatories and cross interrogatories may be answered before any officer authorized to take depositions, no one to be present except the officer and the said W. F. Woods, and the same to be subject to exception for irrelevancy or incompetency.

MECHEM & BRYANT,
Attorneys for Plaintiffs.
RATCLIFFE & FLETCHER,
Attorneys for Defendant.

Nov. 14-1-02.

Caption.

JOHN WOODS & SONS, Plaintiffs,
vs.
FRANK CARL, Defendant.
} Suit Pending in the Circuit Court of Pulaski County, Ark.

The deposition of W. F. Woods taken between the hours of ten o'clock a. m. and four o'clock p. m., on the 19th day of March A. D. 1902, at the office of W. B. Lobban, a notary public within and for Bexer County, Texas, in San Antonio in said county, to be read as evidence in an action between John Woods & Sons, a partnership, plaintiffs and Frank Carl, defendant, pending in the Pulaski County Circuit Court in the State of Arkansas, on the part of the plaintiffs.

Answers of the Witness, W. F. Woods, to the Direct Interrogatories.

To the 1st Direct Interrogatory he answers:

My name is W. F. Woods, aged 33 years; occupation that of a banker doing a general banking and discounting business; and my residence is at No. 2205 Monterey Street, San Antonio, Bexar County, Texas.

To the 2nd Direct Interrogatory he answers:

The partnership of John Woods & Sons is composed of John Woods, W. G. Lee Woods and myself, or W. F. Woods, and I am the one who transacted the business with the Human Gas Co. by which said partnership became the holders of the note sued on in this case.

To the 3rd Direct Interrogatory he answers:

On the 20th day of September 1901 Charles Heberer came to me and said that he was acting for himself and the Human Gas Co., and said we want to place this Thirteen Hundred ($1300.00) Dollar note (Which said note is subsequently attached hereto for identification) executed by Frank Carl, and made in favor of the Human Gas Co., or order, and dated the 6th day of September 1901, with your bank as collateral to secure our indebtedness with you, and also get some additional money on it. I told him I would accept said note as collateral for the money already owed the bank and would also make said company some additional advances on account of said collateral; and on the same day that said collateral was so deposited I did advance said *W. F. Woods* Human Gas Co. the sum of forty six dollars and eighty five cents ($46.85); and on the 21st of September 1901 I advanced said company sixty one dollars and ninety cents ($61.90) and also made some other advances through September and October 1901, aggregating over Four Hundred Dollars ($400.00), all of which said advances were so made to the Human Gas Co., on the strength of said collateral. At the time said note was delivered to me on the 20th. of September, Charles Heberer endorsed the following on the reverse side thereof: "Pay to the order of John Woods & Sons—Human Gas Co., Heberer," and then delivered the same to me. Said note is hereto attached for identification marked on the reverse side hereof as follows: "For identification—W. P. L.—Notary Public

aking this deposition W. F. W. witness." This note was taken as ollateral in the regular course of business, before maturity, for a aluable consideration as above fully explained without any knowl-dge of the cause or consideration for its execution. At the time I ook this note as collateral the Human Gas Co. owed the bank of ohn Woods & Sons, twenty eight hundred and forty nine dollars nd seventy six cents ($2849.76), and at the time said note was de-osited as collateral it was a part of the understanding and agree-nent that the bank would extend the time for the payment of said mount, all of which was for overdrafts, which extensions were ranted, and were then past due and payable, until said collateral ell due out of which the amount owed the bank should be paid; nd on the 6th day of October 1901 the Human Gas Co. still owed s thirty one hundred and twenty three dollars and forty nine cents $3123.49).

To the 4th. Direct Interrogatory the witness answers:

At this time the Human Gas Co. still owes John Woods & Sons a anking partnership composed of John Woods, W. G. Lee Woods nd W. F. Woods, the sum of thirty five hundred and ninety eight ollars and twelve cents ($3598.12), for the partial payment of which we still hold the collateral note.

7 To the 5th. Direct Interrogatory the wituess answers:

I do not now recall anything further that is material to the ights of either party to this case.

W. F. WOODS.

Subscribed and sworn to by said witness as before the under-igned authority on this the 19th. day of March 1902 at 1 o'clock nd twenty minutes P. M.

[SEAL.]

W. B. LOBBAN,
Notary Public, Bexar Co., Texas.

Answers of the Witness W. F. Woods to the Cross Interrogatories.

To the 1st. Cross Interrogatory the witness answers:

I have no connection whatever with the Human Gas Co.; and if n your question you meant to elicit what connection John Woods & Sons, or any of its constituent members may have with the Human Gas Co., I will answer that neither John Woods & Sons, nor any ne or more of its members, as above given, have any connection whatever with said Human Gas Co.

To the 2nd. Cross Interrogatory the witness answers:

Since about September 1900 the Human Gas Co. have kept its leposits with John Woods & Sons, bankers, and we have loaned it noney, and did a general banking business with said company. During the taking of this deposition no one has been present except he officer and myself.

W. F. WOODS.

Subscribed and sworn to by said witness before the undersigned

authority on this the 19th. day of March A. D. 1902 at 1
28 o'clock and thirty five minutes P. M.

W. P. LOBBAN,
Notary Public within and for Bexar County, Texas.

My commission expires on June 1st. 1903.

Notary fees paid by John Woods & Sons $2.50.

STATE OF TEXAS, }
County of Bexar, }

I, W. P. Lobban, a Notary Public within and for Bexar County, Texas, being duly qualified and acting as such do hereby certify that the foregoing deposition of W. F. Woods was taken before me, in accordance with the accompanying agreement, and was read to and signed by him in my presence, and at the time and place and in the action mentioned in the caption, the said witness first having been duly sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, and his statements reduced to writing by me in the presence of said witness; and I further hereby certify that no one, except the said witness and me, were present when said deposition was taken, and said examination being made.

Witness my signature and official seal this 19th. day of March 1902.

W. P. LOBBAN,
Notary Public within and for Bexar Co., Texas."

"Endorsed: Opened, published and filed March 22nd. 1902. J. J. McEvoy, Clerk, by W. Ross McCain, D. C.

29 Said note attached to said deposition is as follows:

"$1300.00. LITTLE ROCK, ARK., September 6th, 1901.

Thirty days after date I promise to pay to the order of Human Gas Co. Thirteen Hundred Dollars, for value received, negotiable and payable without defalcation or discount at the Bank of Commerce of Little Rock, Ark., with interest from date at the rate of ten per cent. per annum until paid. The makers and endorsers of this note hereby waive presentation of payment, notice of non-payment and protest.

FRANK CARL.

Due October 6th. 1901.

Written across face:

"Protested Oct. 19, 1901 for non-payment
GEO. W. ROGERS,
Notary Public."

30 Testimony of C. G. Human for Plaintiffs.

C. G. HUMAN, a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Q. Are you the C. G. Human who appears to have executed the contract offered here in evidence on the part of the Human Gas Co.?
A. Yes sir.
Q. Of whom was the Human Gas Co. composed at that time?
A. Chas. Heberer, J. W. Hansell and myself.
Q. How was the consideration mentioned in the contract which has been offered in evidence paid?
A. Promissory note for $1300.00 and $200.00 that Mr. Carl was to hold as our part of the working capital.
Q. Do you mean the note in suit here?
A. Yes sir.
Q. Was there any other and different contract between the Human Gas Company and Mr. Carl than the one that has been read in evidence here?
A. No sir.

No cross-examination.

This was all the evidence in the case.

31 Instructions Asked by Plaintiffs and Refused by Court.

The plaintiffs thereupon requested the court to instruct the jury to find for the plaintiffs, which motion was by the court over ruled, to which ruling of the court in overruling said motion the plaintiffs at the time excepted and asked that their exceptions be noted of record, which was accordingly done.

Court's Instructions to the Jury.

Thereupon the court instructed the jury as follows:
"If you find that this note was given for a patent right machine or territory you will find for the defendant; if not you will find for plaintiffs." To which instruction plaintiff excepted.

Submission.

Thereupon the case was submitted to the jury and after deliberation they returned into court the following verdict, to wit:

Verdict.

"We the jury find for the defendant.
R. W. WALKER, Foreman."

Thereupon the 12th. day of May 1903 plaintiffs filed their motion for a new trial, which is as follows, to wit:
For motion for New Trial see Page 7.

32 Motion for new Trial Overruled.

And thereupon during the same term of court, the motion for a new trial coming on to be heard, and the court being sufficiently

advised in the premises, overruled said motion for a new trial, to which ruling of the court in overruling said motion the plaintiffs at the time excepted, and asked that *his* exceptions be noted of record, which was according- done.

Bill of Exceptions Approved.

And now come the plaintiffs herein and tender to the court this their bill of exceptions, which is by the court examined, and the same being found in all things correct, is by the court allowed, approved and signed as such bill of exceptions, and ordered to be filed as a part of the record in the case.

Given under my hand this 5th. day of September, 1903.

E. W. WINFIELD,
Judge Sixth Judicial Circuit, Second Division.

Endorsed on back: Filed Sept. 5th. 1903, Ed F. McEvoy, Clerk, By H. G. Dale, D. C.

33 STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, Ed F. McEvoy, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the above and preceding 23 pages, contain a true, complete and perfect transcript of all the pleadings and record entries in the case of John Woods & Sons vs. Frank Carl as the same now appear on file and of record in my office.

Witness my hand and official seal, this 10th. day of October, 1903.

ED F. McEVOY, Clerk.

Fee Bill.

Clerk's costs (Ed F. McEvoy) (P'd by Pl'ff- $9.40)		$8.75
This transcript (P'd by Pl'ffs' att'ys $8.20)		8.20
Sheriff's costs (P'd by Pl'ff- 60c.)		1.55
Notary's fees W. P. Lobbam		2.50
Jury Tax		3.00
Stenographer's costs reporting case..	P'd by Pl'ffs'.... $3.00	
Bill of Exceptions	Att'ys $6.60..... 3.60	
		6.60
		$30.60

(A. C. Miller, Court Stenographer.)

Attest: ED F. McEVOY, Clerk.

34 Jno. Woods & Sons, Plaintiffs, Appellants, vs. Frank Carl, Defendant, Appellees. } No. 5478. Pulaski. Ed. W. Winfield, J. $11.50.

The plaintiff- prays an appeal in the above and foregoing cause.
Oct. 19th, 1903.

MECHEM & BRYANT,
Att'ys for Plaintiffs.

Appeal granted.
P. D. ENGLISH, Cl'k.

Paid $11.50.
MECHEM & BRYANT.
RATCLIFFE & FLETCHER.

We hereby waive summons and enter the appearance of Frank Carl appellee.

RATCLIFFE & FLETCHER,
Att'ys for Appellee.

5478.

35 Proceedings.

State of Arkansas, In the Supreme Court, } *sct:*

Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November A. D. 1904, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the First day of May 1905, a day of said term:

John Woods & Sons, Appellant-, v. Frank Carl, Appellee. } 5478. Appeal from Pulaski Circuit Court.

Submission.

Come the parties to this cause by their respective attorneys, and this cause after oral argument by attorneys is submitted upon the transcript of *of* the record and the briefs of counsel, and by the court taken under advisement.

36 State of Arkansas, In the Supreme Court, } *sct:*

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the City of Little Rock, on the 28th day, being the fourth Monday of November A. D. 1904, amongst others were the following proceedings, on the 6th day of May A. D. 1905, a day of said term.

JOHN WOODS & SONS, a Partnership Composed of John Woods, W. G. Lee Woods, and W. F. Woods, Appellants,
vs.
FRANK CARL, Appellee.

Appeal from Pulaski Circuit Court.

Judgment.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant- all his costs in this Court, in this cause expended and have execution thereof, to all of which judgment the appellants excepted, which is hereby noted of record.

In testimony that the above is a true copy of the judgment of said Supreme Court in the case therein:

37 Opinion Supreme Court.

In the Supreme Court of Arkansas, May 6, 1905.

WOODS & SON-
v.
CARL. } No. 355.

Statement by the Court.

Appellants sued appellee to recover upon a negotiable promissory note executed by the latter to the Human Gas Company, and which said payee for a valuable consideration, assigned to appellants before maturity. Appellee for defense, alleged that "the consideration of the note sued on herein was the sale to him by the said Human Gas Company of a certain patented machine * * *, and the right to the patent thereof in Arkansas, and the said note not being executed in the form required by law is absolutely void."

The facts are undisputed. The Human Gas Company, a partnership composed of C. G. Human, Chas. Heberer and J. W. Hansell, were the owners of the right to manufacture and sell in the State of Arkansas, and other States, a patented machine known as the Human Automatic Acetylene Gas Generator used for the purpose of generating gas; and in consideration of the note sued on, and the payment of the sum of $200, executed to appellee a written contract reciting that they "have sold, and by these presents do sell to Frank Carl of Little Rock, Ark., a party of the second part, an undivided one half interest in our business to be known as the Human Gas Company of Arkansas for the sale and manufacture of the

Human Automatic Acetylene Gas Generator in the said State of Arkansas."

The court instructed the jury as follows: "If you find that this note was given for a patent right machine, or territory, you will find for defendant; if not, you will find for plaintiff." To which instruction plaintiff excepted.

The jury returned a verdict for the defendant and the plaintiff appealed.

38 Opinion.

McCULLOCH, *J.* (after stating the facts):

The note sued on does not conform to the provisions of the act of April 23, 1891 (Kirby's Dig. secs. 513–516) in that it does not show upon its face that it was executed in consideration of the sale of a patented article or patent right.

The statute in question is as follows:

SEC. 513. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void.

SEC. 514. The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

Sec. 515. Any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of section 513 shall upon conviction be punished by a fine of not more than three hundred dollars.

SEC. 516. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

Appellant contends, in the first place, that the contract in evidence shows neither a sale of a patented article nor a patent right, but we think it is quite clear that the contract must be construed as a sale of a patent right. It in express terms conveys to ap-

39 pellee an undivided one half interest in the business of manufacturing and selling a patented machine in the State of Arkansas for an unlimited time and provides that "in the event the net earnings of the Human Gas Co. has not been sufficient to cover the amount of the said Frank Carl's investment by January 1, 1902, then the Human Gas Co. hereby agree and bind ourselves to relinquish all of our right, title and interest in and to the said State of

Arkansas * * * and give said Frank Carl a good deed and manufacturer's right in and to the said State of Arkansas for the sale and manufacture of the Human Automatic Acetyline Gas Generator." A conveyance of an interest in the right to sell a patented article in a given territory is as much a sale of a "patent right" as a conveyance of the entire right to sell in the territory. No distinction can be made between the transactions in this regard. New v. Walker, 108 Ind. 370; Pinney v. First Nat. Bank (Kan.) 75 Pac. 119.

It is urged by appellant that this statute is in conflict with section 8 Art. 1 of the Constitution of the United States giving to the Congress of the United States the power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries."

In the case of Tilson v. Gatlin, 60 Ark. 114, this court had under consideration the act of April 9, 1891 (Kirby's Digest, sec. 512) changing the rules of the law merchant concerning commercial and negotiable paper, so as to permit the payee or drawee of such paper executed in payment of a patent right, or patent right territory, to make all defenses against the assignee or holder of such paper that he could have made against the original payee or drawee, whether such paper be assigned before maturity or not; and that statute was held not to invade the power of Congress to create patent rights, etc. It is difficult to perceive any distinction between the validity of the two statutes in that regard, for if the legislature had the rightful power to pass one of the statutes, it had also power to pass the other. If the jurisdiction of Congress over the subject of patents and patent rights is so extensive as to exclude the power of a State to declare void, unless made in certain form, written obli*lag*tions given in consideration of sales of patent rights, or patented articles, then it also follows that the State is powerless to alter the established rules of the law merchant so as to permit defenses, not applicable to other negotiable paper, to be made to such paper given in consideration of sales of patent rights or patented articles.

The argument of learned counsel for appellants that such legislation is an improper "discrimination against patented articles by imposing upon their sale conditions and restrictions not placed upon the sale of other similar articles," is as cogent against one of the statutes on the subject as against the other.

In Wyatt v. Wallace, 67 Ark. 575 the precise question was presented there as presented here and the court held that there could be no recovery upon the note sued on. We are asked by counsel to review the question, inasmuch as in the last named case the alleged conflict between the statute and the constitutional power of Congress on the subject was not discussed either in the argument of counsel or the opinion of the court.

This question was before the supreme court of Tennessee in a recent case State v. Cook, 107 Tenn. 499, and that court held that a statute similar to our own was valid and not in conflict with the Constitution of the United States. The reasoning of that court, in

the very lucid opinion by Judge Caldwell, where all the authorities are carefully reviewed is, to our minds, conclusive of the proposition that such legislation by the States is not in conflict with the Federal Constitution.

In Tennessee, as in Arkansas, the legislature first enacted a statute permitting the same defenses against negotiable paper in the hands of any holder or assignee as while in the hands of the original payee; and later, another statute was passed declaring it to be unlawful to accept a note given for the sale of a patent right unless it shall appear upon the face of the note that the same is given in the purchase of a patent right.

The learned judge, in the case cited said: "The two statutes are to be construed together as different parts of the same legislative scheme. Their combined effect when each is strictly ob-
41 served and enforced, is simply to prevent written obligations for the purchase of patents or interests therein from being negotiable in the highest sense, and to subject them in whosesoever hands to all defenses available to the maker against the original payee. So construed, neither act by itself, nor the two combined into a single scheme, can be truly said to contravene any provision of the Federal Constitution and statutes in reference to patents or to restrict or impair the right of sale guaranteed thereby. * * * These statutes are also sustainable as valid police regulations, having been passed in good faith for the real promotion of the public welfare, and being well calculated to accomplish that end through the fair and much needed protection thereby afforded against imposition and fraud so often and so easily perpetrated in the sale of the peculiar incorporeal right or intangible property, contemplated." This view is sustained by the following decisions of the courts of last resort of other States. Sandage v. Studebaker, 142 Ind. 148; Hankey v. Downing, 116 Ind. 118; New v. Walker, 108 Ind. 370; Union National Bank v. Brown, (Ky) 41 S. W. 273; Mason v. McLeod, 57 Kan. 105; Pinney v. First Nat. Bank (Kan) 75 Pac. 119; Tod v. Wick, 36 Ohio St. 370; Haskell v. Jones, 86 Pa. 173; Patterson v. Kentucky, 97 U. S. 511.

The Kentucky court of appeals in passing upon a similar statute said: "The right to prescribe regulations for the protection of its citizens against fraud and imposition is not taken from the State by the federal constitution or by any national statute. On the contrary, it may be considered as having been authoritatively settled that the national government cannot exercise police powers for the protection of the inhabitants of a State. These are local matters, and must be governed and regulated by the State." Union National Bank v. Brown, *supra*.

In New v. Walker, *supra*, the supreme court of Indiana, said concerning a statute on this subject: "As the Federal Legislature cannot enact police regulations which will yield the citizen of the State just protection, it must be that the State legislature may enact such regulations, or the citizens be left without protection. We are unwilling to declare that vendees of patent rights can not be restrained by reasonable police regulations, and we do, therefore declare,

that the provisions of the statute under immediate mention,
42 being in the nature of police regulations, are constitutional and valid."

The contrary view is expressed, with more or less directness in the following cases in State courts: Hollida v. Hunt, 70 Ill. 110; Carson v. Smith, 37 Mich. 309; Welch v. Phelps, 14 Neb. 134; Crittenden v. White, 23 Minn. 24; and in the following Federal cases: *Ex-parte* Robinson, 2 Bis. 309; Woolen v. Banker, 2 Flip. 33; Castle v. Hutchinson, 25 Fed. 394; Reeves v. Corning, 51 Fed. 774 and Pegram v. Am. A. Co. 122 Fed. 1000.

We have no hesitancy in reaching the conclusion that those cases are best supported by reason which hold to the doctrine that such statutes as that now under consideration do not amount to an interference with or impairment of the rights conferred by the patent issued by the Federal Government, nor to an invasion of the constitutional authority of Congress. We therefore adhere to the rule announced by this court in Wyatt v. Wallace, *supra*, and Tilson v. Gatlin, *supra*, that the statutes in question are valid.

It is urged by appellant's counsel in argument that the last clause of the act of April 23, 1891 exempting from its operation "merchants and dealers who sell patented things in the usual course of business," violates that clause of the Fourteenth Amendment of the Constitution of the United States guarantying to all persons within the jurisdiction of a State "the equal protection of the laws," and renders the entire act void.

Our attention is cited by counsel, among other authorities thought to sustain their contention on this point, to the opinion of Judge Rogers in the recent case of Union County National Bank v. Ozan Lumber Co. 127 Fed. 206, but we do not find it necessary to review these authorities, nor to pass upon the question now as it is not essential to a decision of this case. The exemption in question applies only to the sale of "patented things" in the usual course of business, and not to the sale of patent rights. If it be conceded that this exemption be an improper discrimination (which we do not decide) as to those who sell patented articles, and renders the act void as to its application to all sales of patented articles, it leaves the act unimpaired in its application to the sale of patent rights. The
43 act may be unconstitutional and void as to its application to part of the subject matter and valid as to others and we think this rule preserves, unimpaired, the provisions of the statute with reference to notes given for the sale of patent rights. Leep v. Railway, 58 Ark. 407; State v. Deschamp, 53 Ark. 490; L. R. & F. S. Ry. v. Worthen, 46 Ark. 312; State v. Marsh, 37 Ark. 356; Union County Bank v. Ozan, 127 Fed. *supra;* Cooley's Const. Lim. (7th Ed.) pp. 246–250.

Though section one of the act applies primarily only to the sale of patented articles, and even if it be held to be void as to its application to those articles it will yet be retained so as to carry the application of the second section to it as to the sale of patent rights.

It is further contended that the cause should be reversed because the court erred in submitting to the jury the question as to whether

or not the note was given for sale of a patented machine, when there was no evidence of such sale. The instruction was erroneous in this respect but no harm resulted as the facts were undisputed and, upon proper construction of the contract and applying the law as herein declared, the verdict was right. Affirmed.

44 Statement of Judgment and Costs.

STATE OF ARKANSAS, } ss:
In the Supreme Court, }

Clerk Sup. Ct. paid by appellant		$11.50
Transcript fee " " "		8.20
Due appellee printing brief		10.00
Costs in Circuit Court	$22.40	
Paid by plaintiff	16.60	
Due	5.80	
Transcript fee to Sup. Court U. S. Fees P. D. English Clerk on Error to Sup. Ct.		$15.70

STATE OF ARKANSAS, }
In the Supreme Court. }

I, P. D. English, Clerk of the Supreme Court, do hereby certify that the above statement is correct.

Attest with Seal: P. D. ENGLISH, Clerk.

45 Certificate to Transcript.

STATE OF ARKANSAS, } ss:
In the Supreme Court, }

I, Peyton D. English Clerk of the Supreme Court of Arkansas, hereby certify that the foregoing 35 pages and pp. II to V. contain a full true and complete transcript of the record and all proceedings in said Court in the cause therein stated.

In testimony whereof I hereto set my hand and affix the seal of said court at my office in the city of Little Rock, the capital of said State this 5th day of August A. D. 1905.

[Seal of the Supreme Court of the State of Arkansas.]

PEYTON D. ENGLISH, Clerk.

Endorsed on cover: File No. 19,878. Arkansas Supreme Court. Term No. 376. John Woods & Sons, Plaintiffs in Error, vs. Frank Carl. Filed August 18th, 1905. File No. 19,878.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1905.

JOHN WOODS & SONS,
Plaintiffs in Error.
vs.
FRANK CARL,
Defendant in Error.
No. 76

ARGUMENT FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR

Under the practice in Arkansas there was no pleading which the plaintiff could file in the trial court setting up the federal right claimed by it. It could

not be set up in the complaint as it was no part of the original cause of action and a reply can be filed, under our statute, only to the allegation of a counter claim or set off in the answer (Section 6108 Kirby's Digest Statutes of Arkansas). The question was properly presentable in argument in support of the motion for a peremptory instruction in favor of the plaintiff. Nor is there any method of setting up the question in the supreme court of the state except by argument, there being no provision under our practice for assignments of error outside the printed or oral arguments of the party. In view of these facts the decision in *Land & W. Co. vs. San Jose Ranch Co.*, 189 *U. S.* 177, is pertinent. There it was held that the federal right was sufficiently presented, although "not originally claimed and set out by the plaintiff *inasmuch as it was not an original right, but a right available in rebuttal of the defense.*" The rule is moreover now firmly established in this court, that when the opinion of the court below sent up in the record, discloses that a federal right was claimed, considered and decided adversely to the claimant, that gives this court jurisdiction. In *M. K. Ry. vs. Elliott*, 184 *U. S.* 530, it was said that "all that is essential is that federal questions must be presented to the state court in such a manner as to bring them to the attention of the court, and of course, where it was shown by the record that the state court considered and decided the federal question the purpose of the statute is subserved." This holding is expressly pre-

dicated upon the opinion of the state court, there found in the record, which recited the contention for a federal right, considered and decided adversely to plaintiff in error. *Land & W. Co. vs. San Jose Ranch Co., supra*, alluded to the early ruling of the court that the opinion of the state court could not be looked into to ascertain whether a federal question had been presented and passed upon, as overruled by the numerous cases therein cited, saying "under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words, 'specially set up and claimed' that it was fully considered in the opinion of the court, and ruled against the plaintiff in error."

The opinion of the court below states the contention of the plaintiffs that the legislation of the state relied upon as a defense, was void because in derogation of the rights granted by the United States in issuing a patent and then proceeds to a very full discussion of the question concluding with an explicit ruling far the defendant on the sole ground that the legislation attacked was a valid exercise of the power of the state, notwithstanding the federal origin of patents.

HOMER C. MECHEM,
Attorney for Appellant.

EDWIN MECHEM,
of Counsel.

FILE COPY.

Office Supreme Court, U.S.
FILED.
NOV 3 1906
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1905.

JOHN WOODS & SONS,
Plaintiffs in Error,
vs.
FRANK CARL,
Defendant in Error.

No. 102.

BRIEF FOR PLAINTIFFS IN ERROR

HOMER C. MECHEM,
Attorney for Appellants.

EDWIN MECHEM,
of Counsel.

HAMMOND PRINTING CO., Fort Smith, Ark.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1905.

JOHN WOODS & SONS,
Plaintiffs in Error,
vs.
FRANK CARL,
Defendant in Error.
No. 76

BRIEF FOR PLAINTIFFS IN ERROR

This action was brought by the Plaintiffs in Error against the Defendant in Error upon a note given by him to the Human Gas Company and by it endorsed to the Plaintiffs in Error before maturity for value.

The answer set up "That the consideration of the

note sued on herein was the sale to him by the said Human Gas Company of a certain patented machine and of the right to the patent therefor in Arkansas and the said note not being executed in the form required by law was absolute void."

The evidence sustained the claim of the defendant as to the consideration of the note and the note did not show upon its face that it was executed in consideration of a patent right.

The plaintiffs requested the court to instruct the jury to find for them which it refused to do, plaintiffs excepting, and the Court then instructed the jury "If you find that this note was given for a patent right machine or territory you will find for the defendant; if not you will find for the plaintiffs." To which plaintiffs excepted.

The case was appealed to the Supreme Court of the State and affirmed on the ground that Sections 513 to 516 Kirby's Digest of the Statutes of Arkansas, was a valid statute and not in conflict with the Constitution of the United States and the Laws of Congress relating to patent rights and the transfer of the same.

THE COURT BELOW ERRED BECAUSE SECTIONS 513 TO 516 KIRBY'S DIGEST STATUTES OF ARKANSAS ARE UNCONSTITUTIONAL AND VOID AS A DIRECT INTERFERENCE WITH THE EXCLUSIVE POWFR

OF CONGRESS TO CREATE PATENT RIGHTS AND AS AN INVASION OF THE RIGHT RECEIVED BY THE PATENTEE FROM THE FEDERAL GOVERNMENT

These Sections are as follows, to-wit:

"Section 513. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void.

"Section 514. The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

"Section 515. Any vendor of any patented thing of any character or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of Sec

tion 513 shall upon conviction be punished by a fine of not more than Three Hundred Dollars.

"Section 516. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

It will be seen upon examination, that the trial court submitted the case to the jury, under the foregoing sections, which constitute the Act set up in the answer. The sole question then to be decided here is the validity of an Act of a State legislature, declaring void a note given for a patent right without complying with certain requirements of the State. Legislation of this character has appeared in the courts of a number of states, with varying results, but the weight of authority there is against its validity as will be seen in *Hollida v. Hunt, 70 Ill. 110; Cranson v. Smith, 32 Mich. 309; Welch v. Phelps, 14 Neb. 134: State v. Lockwood, 43 Wis. 405; Crittenden v. White, 23 Minn. 24: Palmer v. State, 39 O. S. 236: Haskell v. Jones, 86 Pa. S. 173,* and *Clark Co. v. Rice, 106 N. W. 231, (Wis.).* The Illinois case was one dealing with a statute which only took away the negotiable quality from a note given for a patent right. The opinion of Scholfield J. concurred in by eminent associates, deals with the question upon both principle and authority, and unhesitatingly holds such legislation invalid. The Michigan case decided in the palmy days of that court, then headed by Judge Cooley, is so strong and clear

and disposes so completely of the claim that such legislation is a justifiable exercise of the police power that we cannot forbear quoting from it.

"The subject of granting patents and regulating the rights of patentees has been placed by the Constitution of the United States in the control of Congress. It is for that body alone to determine to whom and on what conditions they shall be granted, and how the patented privileges are to be transferred or disposed of. Where any right or privilege is subject to the regulations of Congress it is not competent for State laws to impose conditions which shall interfere with these rights or diminish their value. In those cases where the congressional power is lawfully exercised it is supreme. In the absence of any policy to the contrary, the transfer of such rights may follow, as it usually does, the State rules applicable to similar property, as to sales or inheritances. But any attempt to discriminate against it is a direct invasion of the authority of the United States, and is invalid.

This doctrine is so elementary that reference to particular cases seems needless.

It is unfortunately true that many frauds are committed under color of patent rights, and that the patent laws are not so framed as to secure the public from being cheated by worthless inventions. The State may punish frauds upon its citizens committed by any manner of false pretenses. But it cannot lawfully assume that the rights granted by the United States are presumably fraudulent, nor can it punish frauds committed by persons holding those privileges on any different grounds from others. Such presumptions are in plain violation of every principle of justice and constitutional obligation.

While we cannot but recognize the magnitude of an evil which has brought patents into popular dis credit, and has provoked legislation in several states

similar to that of Michigan, we cannot on the other hand fail to see in these laws a plain and clear purpose to check the evil by hindering parties owning patents from dealing with them as they may deal with their other possessions. The Constitution of the United States not only allows, but favors the special protection of inventors. The measure of that protection, and its conditions, cannot be fixed by any power but Congress, and the remedy for abuses or defects in the legislation of that body must be found in its own revision of its own laws. It is not competent for State statutes to deal with them, or to revise the national policy."

The other State cases follow the same line and are reinforced by *Helm v. Bank, 43 Ind. 167*, which discussed and decided the question upon the true constitutional doctrine. Subsequent Indiana cases beginning with *Brechbrill v. Randall, 102 Ind. 528*, do not overrule the Helm case but do depart from it in deference to a mistaken view of the scope of the principle announced by this Court in *Patterson v. Kentucky, 97 U. S. 501*, hereinafter discussed. But *New v. Walker, 108 Ind. 40*, distinctly admits the exclusive Federal power over the sale of a patent right, though insisting on the police power of the states over things made under a patent. The Ohio Court said, "The State cannot discriminate against patented articles by imposing upon their sale, conditions and restrictions not placed upon the sale of other similar articles." And the Pennsylvania Court says, "If the Act entitled 'An Act to regulate the execution and transfer of notes given for patent rights' * * * * makes absolute-

ly void all such notes in which the words 'given for a patent right' are not prominently and legibly written or printed on the face of such a note above the signature thereto; there would be great reason for the contention that the act is unconstitutional and void. *No State can so interfere with the right of a patentee, secured to him by the Acts of Congress, to sell and assign his patent.*"

Of the cases from the State Courts, which have upheld legislation against patent rights, most rest upon the misconception of *Patterson v. Kentucky*, alluded to, while in others, as for instance, *State v. Cook, 107 Tenn. 499*, the statute construed is declared to be one "to prevent written obligations for the purchase of patents or interest therein from being negotiable in the highest sense and to subject them in whosesoever hands to all defenses available to the maker against the original payee." *State v. Butler, 3 Lea 222*, cannot be reconciled with *State v. Cook*, neither can the Kentucky cases upholding the legislation in that State, be harmonized with the declarations found in *Commonwealth v. Petty, 96 Ky. 452*. A critical examination and analysis of the cases in the State Courts will justify our assertion that the weight of authority in those Courts is against the validity of the Arkansas Act.

These cases, however, not being authoritative, we turn to the history of this restricting and interfering legislation in the Federal Courts, where it has been

uniformly held void. Mr. Justice Davis in *Ex Parte Robinson, 2 Biss. 309*, said:

"This is an attempt on the part of the legislature to direct the manner in which patent rights shall be sold in the state; to prohibit their sale altogether if these directions are not complied with, and to throw burdens upon the owners of this species of property, which Congress has not seen fit to impose upon them. * * * * * * It is clear that this kind of legislation is unauthorized. To Congress is given, by the constitution, the power 'to promote the progress of science and the useful arts by securing for limited times, the authors and inventors, the exclusive right to their respective writings and discoveries.' This power has been exercised by Congress, who have directed the manner in which patents shall be obtained, and when obtained, how they shall be assigned and sold. The property in invention exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere in the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the constitution. The law in question attempts to punish, by fine and imprisonment, a patentee, for doing, with his property, what the national legislature has authorized him to do and is therefore void."

It next came before Justice Sawyne in *Woolen v. Banker, 2 Flip 33, No. 18,030, in 30 Fed. Cas.* That Court speaking of the same class of legislation in

Ohio, on a motion for a new trial of a case which had been decided against the Statute by the District Judge said:

"That the Constitution of the United States has conferred upon Congress the power to 'promote the progress of science and the useful arts, by securing for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries,' by Section 8, Article 1, is no more certain than that such power has been exercised by the enactment of patent laws, and that no state can limit, control, or even exercise the power. Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which such rights can be sold and conveyed, and has imposed the penalty for the infringement thereof. The National Government has, therefore made a patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference with it whatever by any state, that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The Statute in question is such an interference, and is unconstitutional."

The Robinson Case, supra; was referred to approvingly in this opinion.

One year after this decision of Justice Swayne, *Patterson v. Kentucky*, *97 U. S. 501*, was decided, Justice Swayne concurring. The well known individuality of that jurist is a sufficient assurance that he would not have concurred tacitly in the reversal of his well matured opinions on the subject. He very evidently did not regard that case as trenching in any wise upon

his views. If the majority of that court had understood that two reported decisions by its members were being overruled some mention of those decisions and reasons for refusing to follow them would undoubtedly appear. A careful scrutiny of the opinion demonstrates conclusively that it decided nothing adverse to the conclusion reached by Justices Davis and Swayne. No court holds more rigidly to the doctrine that its decisions must always be construed and applied, as to their scope, in view of the facts present for determination, than this court. The Patterson case decided nothing as to restrictions upon the SALE OF A PATENT, because that subject was not presented by the record. It settled nothing as to the power of a state to restrict, limit or condition the sale of a patented article, THE SUBJECT OF ORDINARY AND HARMLESS COMMERCE, because that question was not before it. It did decide that all property was subject to the police power of the state in which it was offered for sale, regardless of the fact that the process by which it was made was patented, a decision which has never been criticized and never will be. It did not so decide because of any quality imparted to the article in the process of composition or refinement BY REASON OF THE PATENT, for it would have been equally dangerous whether made before the process or composition was patented or after. The patent neither added to, nor withdrew from, the oil any dangerous element or characteristic. When the purpose of a patent is considered the force

of the decision is seen at once. A patent has nothing to do with authorizing the manufacture of the product. Its sole purpose is, not to authorize or render possible the manufacture of the thing, but to enable the discoverer or inventor to exclude others from making it except with his permission. This court in *Bloomer v. McQuewan, 14 Howe 549*, defined a patent thus: "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee." Patterson could have made Aurora Oil just as well and just as lawfully without a patent as with it. What he wanted was to prohibit others from making it without his consent. The statute of Kentucky did not interfere with his only right under the patent viz, the right to prevent others from making it. It did not deal at all with the question of EXCLUSIVE right to manufacture but the right of ANYBODY TO MANUFACTURE AT ALL which was a right that existed before the patent and therefore could not have derived its being from the patent. The statute was not aimed at the patent but simply prohibited all alike from making a dangerous thing. It was the character of the oil and not the peculiar method of its production, which brought it within the inhibition. Suppose that after this statute was enacted the patentee had found a party making the oil. The statute could not have been pleaded as a defense to a suit for damages for infringement. The court explicitly de-

clared the Kentucky law to be "in the best sense a mere police regulation" to which all property is subject, that is all property upon which the police power PROPERLY operates. If all patented rights were dangerous to the morals, health and lives of the people, they could poss.bly be suppressed by the police power but the supreme law of the land has determined authoritatively that they are not evil but good. If the thing made under a patent was always a menace to the community, all such things could be destroyed or regulated under the police power but as most of the useful objects which contribute to the comfort of modern civilized life, are of that origin, no one would contend for such an application of that power. The conclusion is irresistable that the Patterson case furnishes no basis for the law of Arkansas which attacks indiscriminately property in patents and in patented articles BECAUSE THEY ARE SUCH. That we are not misconceiving the proper scope of the case let us see how the Federal courts which have had occasion to apply it have regarded it.

In the Habeas Corpus case of In re Lake in the Northern District of Ohio in 1884 this question next appeared. No opinion was filed and we present the case by agreement from a letter filed in the court below from the Clerk of the United States Circuit Court for that District from which it appears that Lake was indicted in June of 1884 in the Common Pleas Court of Wayne County, Ohio, for violation of section 6,993

Revised Statutes of Ohio which provides that any one who takes, purchases, sells or transfers any note not having the words "given for a patent right" written or printed on the face thereof, knowing the consideration of such note to consist in whole or in part of the right to make, use or vend any patented invention shall be fined not more than $500 or imprisoned not more than forty days or both. He was found guilty and while in the custody of the Sheriff filed his petition for Habeas Corpus alleging that the Section, for violating which he had been convicted was "null and void and in contravention of the Constitution and Laws of the United States." The court through Mr. Justice Mathews, sustained the writ and discharged the petitioner from custody on the ground that he "was illegally detained in violation of the Laws and Constitution of the United States." Although we are not aided by a written opinion showing explicitly the views of the court, the well known character of Justice Mathews for painstaking and thorough research, is ample justification for the assertion that the then existing authorities, including *Patterson vs. Kentucky*, were examined and considered by him and that he agreed with the opinions of his predecessors Swayne and Davis and did not regard the Patterson case as intended in any way to affect the views expressed in *Ex Parte Robinson and Woolen vs. Banker.*

In *Castle v. Hutchinson, 25 Fed. 394;* Circuit Judge Woods speaking of the Indiana Statute held

that it was clearly unconstitutional, citing Ex Parte Robinson, supra, and remarking:

"It is claimed that these cases are inconsistent with the opinion of the Supreme Court of the United States, *Patterson vs. Kentucky*, 97 *U. S.* 501. But that case has reference to local restrictions upon the sale or use of tangible property; and, notwithstanding the property was manufactured or produced under letters patent it was held that the enforcement of the Statute of the state interfered with no right conferred with the letters patent. The case manifestly has no application here; the notes in suit having been given, not for tangible property, but for a right in letters patent, in respect to which the states can impose no restriction."

This case was approved by Baker D. J. in the same district in *Reeves v. Corning*, 51 *Fed.* 774.

The next case is *Pegram v. Am. A. Co.* 122 *Fed.* 1000, where Circuit Judge Dallas reviews, at length; all the decisions, distinguishes *Patterson v. Kentucky* and holds the act of Pennsylvania unconstitutional.

Speaking of the *Patterson vs. Kentucky* case he said that that case "concerned only 'the right of property in the physical substance, which is the fruit of the discovery' and it was with respect to this 'physical substance' that it was held that the enforcement of the state statute interfered with no right conferred by the letters patent, and this upon the ground that 'it is not to be supposed that Congress intended to authorize or regulate, the sale, within the state of tangible personal property which that state declares to be unfit and unsafe for use.' The significance of the distinction here indicated is apparent. A patent secures to the patentee the right to debar others from making the thing patented, but it does not confer upon him the right to make it. That he could do (though not exclusively) without a patent. Consequently his right of property

in the patented article, when made, is not founded on government grant, and may as legitimately be subjected to state legislation as any other tangible property. But the monopoly which a patent does grant is a property right created under the Constitution and Laws of the United States, and by those laws made assignable; and therefore a state law which prescribes that negotiable instruments in the ordinary form, shall not be given or accepted for an assignment of the patent itself, is as plainly obstructive of the exercise of a right granted by federal law as would be the inhibition of payment in current funds upon the sale of a patent in cash."

Lastly in *Ozan Lumber Co. v. U. C. N. Bank*, 145 *Fed.* 344 the United States Circuit Court of Appeals, Eighth Circuit held the act under discussion here void. The opinion states the question to be, "Whether the state may so discriminate by hostile legislation against the rights granted by the United States pursuant to the provisions of the Constitution." All the authorities are reviewed, the erroneous view of *Patterson vs. Kentucky* is pointed out and the discussion concluded thus:

"To say that the protection afforded by letters patent because of its peculiar characteristics presents the subject for the exercise of the police power of the state, which may be specially selected for discriminatory legislation, is to say that the state has power to seriously burden and impair the rights granted by Congress under the authority of the Constitution. There is no such difference between patented articles and those of like character, not patented, as will justify such hostile legislation against the former, as is exhibited in the statute under consideration. It

is the right of a patentee to use and enjoy the privilege granted to him, and to manufacture and vend the tangible property, in which his discovery or invention is exhibited, to the same extent and with the same freedom as these who deal in like but unpatented articles. Indeed, this view is expressed in one of the very cases relied on to reverse the judgment of the Circuit Court. In *Webber vs. Virginia* it was said: 'The combination of different materials so as to produce a new and valuable product or result, or to produce a well known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the State, nor can the sale of the article or machine produced be restricted except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted.'

In the manufacture and sale of articles of commerce the right to extend credit and to take negotiable paper, which may readily be discounted and the proceeds turned back into the channels of business that its volume may be increased, is a valuable one and is extensively and beneficially employed. That this right may, under an assumed exercise of the police power of a state be denied those engaged in the manufacture and sale of articles covered by letters patent of the United States, and merely because of such fact, while its free exercise is permitted to all others, is inadmissible. With equal reason a state may destroy the negotiability of all notes taken by National Banks, by other corporations organized under the laws of the United States, by citizens of other states, and in interstate commercial transactions, and may place all such notes in a special and discredited class for the better protection of its own citizens who may be the makers thereof. It is obvious that this cannot be done."

It follows inevitably that, if a state cannot exercise

its police power upon the sale of the tangible thing created under a patent, a fortiori, it cannot touch the patent itself. If the stream may not be obstructed or diverted, certainly the fountain may not be choked up or polluted. The want of power in a state to interfere with a patent right is assumed as unquestioned in *Webber vs. Virginia*, in the statement that: "It is only the right to the invention or discovery—the incorporeal right—which the state cannot interfere with."

It thus appears that every Federal court since the Patterson case has unhesitatingly refused to admit its application to extend to the facts present at the bar. We insist that all Federal authority condemns this statute as an interference with the property right created by a patent.

The sole question in this case is the right of a state to legislate with reference to the sale of a patent, the court below in the concluding clause of its opinion, having held with us that there was no evidence to go to the jury of the sale of a patented thing. All legislation based upon the police power of a state has, and can only have for its subject, the condition, character, or quality of an act or thing which is done or comes into being under the law of the *state*. Now a patent differs from these in that it is of *Federal origin solely* and it results therefore that the legislation here claimed to be a legitimate exercise of the police power of a state, proceeds on the supposed vicious character of *a creation of the Federal Government*. The Federal

Constitution and laws passed in pursuance thereof are, "The supreme law of the land" against which, the effects of which, or the results of which, nothing may be alleged by a State. This supreme law has created a patent and has pronounced it "good and very good" and the State cannot in the exercise of its police, or any other power, ascribe to it noxious or vicious qualities. If the state has the power to regulate, restrain and control the sale of a patent, it can only be because it is a *dangerous* thing, and that premise once granted, the power of the state to make burdensome conditions, and regulations, upon such sale, the effect of which will be to prohibit it; or to prohibit it in express terms follows as matter of course. The court below was content to put its conclusion upon the question whether the subject matter of this legislation, was, by reason of its qualities or characteristics, a proper one for the exercise of police power, but in view of the plaintiff's assertion of Federal rights the determination of that question is not conclusive. Police power of the states, as all their other powers, gives way when brought into contact with the National Government acting within its sphere. This court has expressly so declared in numerous cases. *Henderson v. Mayor of New York*, 92 *U. S.* 272; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 *Id.* 660, and later cases lay down unequivocally the limitations of the police power of the states in these terms;

"Definitions of the police power must, however, be

taken, subject to the condition that the state cannot, in its exercise for any purpose whatever, encroach upon the power of the general Government, or rights granted or secured by the supreme law of the land."

It follows that before the court below can be sustained, it must appear first, that the thing aimed at is of a nature and character to bring it within the general purview of the police power, (i. e. that it is inimical to the public welfare) and second, that it is an object or subject upon which the legislation of the state can be exercised. Plaintiffs deny both propositions, insisting first, that a patent is not noxious or harmful and second, that, if it were, it is a creature of the National Government and therefore beyond the power of the States. Certainly, no one will contend that patents are to be classed with intoxicating liquors, in their direful effect upon individuals or communities, yet this court, although recognizing fully the right of a community to exclude intoxicating liquors from its bounds, was compelled to hold that interstate commerce in such a cause of manifold evils, could not be interfered with by the state under its police power.

We ask that the cause be reversed and remanded to the Circuit Court of Pulaski County, Second Division for further proceedings upon proper principles of law.

Respectfully submitted,

HOMER C. MECHEM,

Attorney for Appellants.

EDWIN MECHEM,
of Counsel.

FILE COPY.

No. 102.

Office Supreme Court U. S.
FILED
SEP 18 1906
JAMES H. MCKENNEY, Clerk.

IN THE

Supreme Court of the United States

JOHN WOODS & SONS.....*Plaintiffs in Error*

v.

FRANK CARL.....*Defendant in Error*

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

The motion to dismiss in this case is as follows:

"The said defendant in error moves the court to dismiss the writ of error herein:

"*First.* Because the record does not show that a "Federal question was ever raised in the Courts of the "State of Arkansas, so as to give this court jurisdic-"tion."

This action was commenced in the State Court by plaintiffs in error upon a promissory note.

The defendant answered: "That the consideration of the note was the sale to him by the said Human Gas Co. of a certain patented machine called the Human Automatic Acetyline Gas Generator, and of the right to the patent

therefor in Arkansas, and the said note not being executed in the form required by law is absolutely void.

"He also denies that the said plaintiffs are holders for value of the said note." (Printed Record 7)

The plaintiff joined issue on this answer, without demurrer. At the trial the court refused to direct a verdict for the plaintiff but instructed the jury that: "If you find that this note was given for a patent-right machine or territory, you will find for the defendant; if not, you will find for the plaintiffs." (Record 17.) There was a verdict for the defendant.

As we understand the practice, in order to raise a Federal question in a State Court so as to give this court jurisdiction, the right must be "specifically claimed or set up," in the State Court, and passed upon by that court, and the record must show that fact.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648.

Zadig v. Baldwin, 166 U. S. 485.

Pim v. St. Louis, 165 U. S. 273.

The answer does not in terms, refer to a statute of Arkansas. If it had done so and the Statute of Arkansas be invalid because of conflict with the Constitution or laws of the United States, then a demurrer to the answer pointing out that fact to the court would have raised the question as matter of law and there was no need to join an issue of fact upon the answer. By joining issue the plaintiff acquiesced in the validity of the law and the court was not called upon to consider its validity. Nor did the objections to evidence by the plaintiffs, nor their prayer for a ver-

dict, necessarily raise any such question. They only go to the competency or sufficiency of the evidence upon the issue joined.

The opinion of the State Court is no part of the record and will not be looked to to determine whether or not a Federal question was raised.

England v. Gebhardt, 112 U. S. 502,

Respectfully submitted,

JOHN FLETCHER, *Attorney of Defendant in Error*

W. C. RATCLIFFE, *of Counsel.*

FILE COPY.

No. 102.

Office Supreme Court
FILED
NOV 6 19
JAMES H. McKE

IN THE

Supreme Court of the United States

JOHN WOODS & SONS.....*Plaintiffs in Error,*

v.

FRANK CARL.....*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR

JOHN FLETCHER,

Attorney for Defendant in Error.

W. C. RATCLIFFE,

of Counsel.

DEMOCRAT PRINTING & LITHO. CO., LITTLE ROCK, ARK.

IN THE

Supreme Court of the United States

JOHN WOODS & SONS.....*Plaintiffs in Error,*

v. No. 76.

FRANK CARL.....*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

In this case the plaintiffs in error challenge the validity of sections 513 to 516 of Kirby's Digest of the Statutes of Arkansas as being in conflict with the Constitution of the United States, and as an interference with the power of Congress to create patent rights and prescribe the terms of transferring the same; and as an invasion of the right received by the patentee from the Federal Government.

The statute was upheld by the Supreme Court of Arkansas in an able opinion which is printed in the record and to which we respectfully refer this Court. The opinion

is sustained by the weight of the modern and well-considered cases.

The cases which uphold such legislation do so upon the ground that the States have the right to exercise police regulations designed, as to this class of property, to protect the people against imposition and fraud.

The doctrine of these cases is well stated in *Mason v. McLeod,* 57 Kan. 105, 41 L. R. A. 548, where the court said:

> "In our opinion these provisions do not trench upon the Federal power nor interfere with the right secured to the patentee by the Federal law. It is true that no State can interfere with the right of the patentee to sell and assign his patent, or take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations, designed for the protection of the people against imposition or fraud. There is great opportunity for imposition and fraud in the transfer of intangible property, such as exists in a patent right, and many States have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property. There were some earlier decisions holding that such regulations trenched upon the Federal power and the rights of the patentee, but recent authorities hold that reasonable police regulations may be enacted by the State without

usurping any powers of the Federal Government, or infringing upon the exclusive right of the patentee."

Citing authorities:

In *State v. Cook,* 107 Tenn. 499, a very able and well-considered opinion in which all the authorities are carefully reviewed, the court said: "These statutes are also sustainable as valid police regulations, having been passed in good faith for the real promotion of the public welfare, and being well calculated to accomplish that end through the fair and much needed protection thereby afforded against imposition and fraud so often and so easily perpetrated in the sale of the peculiar incorporal right or intangible property contemplated."

In *Bank v. Brown* (Ky.), 41 S. W. 273, the Court said: "the right to prescribe regulations for the protection of its citizens against fraud and imposition is not taken from the State by the Federal Constitution or by any national statute. On the contrary, it may be considered as authoritatively settled that the National Government can not exercise police powers for the protection of the inhabitants of a State. These are local matters and must be governed and regulated by the State."

In *New v. Walker,* 108 Ind. 370, the Court said: "As the Federal Legislature can not enact police regulations which will yield the citizens of the State just protection, it must be that the State Legislature may enact such regulations, or the citizens be left without protection. We are

unwilling to declare that vendees of patent rights can not be restrained by reasonable police regulations, and we do, therefore, declare that the provisions of the statutes under immediate mention, being in the nature of police regulations, are constitutional and valid."

Tilson v. Gatling, 60 Ark. 114.

Wyatt v. Wallace, 67 Ark. 575.

Roth v. Merchants & Planters Bank, 70 Ark. 200.

Herdich v. Rossler, 109 N. Y. 127.

Buckhill v. Randall, 102 Ind. 528.

Hankey v. Downing, 116 Ind. 118, 1 L. R. A. 447.

Hackett v. State, 105 Ind. 250, 55 Am. Rep. 204.

Haskell v. Jones, 86 Pa. 173.

Perry v. First National Bank, 75 Pac. 119, 78 Pac. 151.

Webber v. Virginia, 103 U. S. 344.

Patterson v. Kentucky, 97 U. S. 511.

Tod v. Wick, 36 Ohio St. 370.

Arbuckle v. Blackburn, 113 Fed. 627.

These cases repudiate the case of *Ex parte* Robinson, 2 Biss. 309, which is the basis of all the authorities relied on upon by counsel for plaintiffs in error.

The cases which deny the validity of such legislation do so upon the contention that it is in conflict with the Constitution and laws of the United States and a discrimination against patent rights and patented articles.

The chief purpose of the Constitution and laws of Congress *"is to secure to inventors, for a limited time, the exclusive right to their discoveries."* They do not undertake to prescribe how or for what the assignment of a patent right shall be made, further than that the assignment shall be in writing and filed in the Patent Office as against subsequent purchasers without notice.

Rev. Statutes, sec. 4898.

In re Brosnahan, 18 Fed. Rep. 62, Mr. Justice Miller said:

> "The sole object and purpose of the laws which constitute the patent and copyright system is to give the author and the inventor a monopoly of what he has written or discovered, that no one else shall make or use or sell his writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right, but the right in him to the exclusion of everybody else.
>
> "For instance, an author who had written or printed a book always had the right to do so, and to make and sell as many copies as he pleased; and he can do this though he takes out no copyright for his work. But if he wishes to have the benefit of the ex-

clusive right to do this, he can get it by securing a copyright under the act of Congress. All that he obtains then, by this copyright, all that he asks for and needs, and all it was designed to confer on him, is to make the right which he had already in common with everybody else, an exclusive right in him—a monopoly in which no one can share without his permission.

"But let us suppose that the book which he has thus copyrighted is an obscene and immoral book, which, by the law of the State in which it is published, may be seized and destroyed, and for that reason; does this statute, which forbids any one else but him to print and publish it, authorize him to do so? Can he violate the law because no one else can do it? Does the copyright confer on him a monopoly of vice, and an immunity from crime? Suppose a discovery of a cheap mode of producing intoxicating liquor, in regard to which the inventor obtains a patent for the product, does this authorize him to defy the entire system of State legislation for the suppression of the use of such drinks? The answer is that the purpose of the patent law and of the constitutional provision are answered when the patentee is protected against competition in the use of his invention by others; and when the law prevents others from infringing on his exclusive right to make, use or sell, its object is accomplished. This proposition is fully supported by the Supreme Court in the case of *Patterson v. Kentucky,* 97 U. S. 501. That case also cites with approval the following lan-

guage from the opinion of the Supreme Court of Ohio in the case of *Jordan v. Overseers of Dayton,* 4 Ohio, 295:

> "'The sole operation of the statute (the patent law) is to enable him (the inventor) to prevent others from using the product of his labors except with his consent. But his own right of using is not enlarged or affected. There remains in him, as in every other citizen, the power to manage his property or give direction to his laborers at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to State control.'"

Now, if State Legislation may regulate or exclude a work protected by a copyright, as a book, if it may regulate or exclude the product of the patent right, or the manufacture thereof, from the State, as in the case of whisky or oil food or other dangerous articles, why may it not regulate the sale of the patent itself? What good would it do a person with a copyright or the owner of a patent right to sell that right so as to include the territory of any State unless the product of such right can be also manufactured or sold in that State? What is the difference in regulating the product—the tangible result of the patent right—and in regulating the sale of the patent or intangible right?

The patent right is property, and entitled to all the protection and subject to all the incidents which relate to other property. There is no reason why it should be exempt from all proper regulations of the police power the same as other property.

Cammeyer v. Norton, 94 U. S. 225.

It would seem that there would be greater reason for regulating the patent right, which is intangible, and is more liable to be made the means of fraud and deception than the product, which is tangible, subject to inspection and less liable to defraud or deceive.

Hankey v. Downing, 116 Ind. 118, 1 L. R. A. 447.

State v. Peck, 25 Ohio St. 26.

Ford v. Wick, 36 Ohio St. 370.

This Court, in the cases of *Patterson v. Kentucky,* 97 U. S. 501, and *Webber v. Virginia,* 344, while upholding the right of the States to exercise the police power over the manufactured article recognizing the principle broad enough to reach the patent right itself. The nature of the property was such as to require the exercise of the police power over it for the purpose of protecting the public. The same is true of the patent right. Their nature is such that it has become necessary for the public good that the police power of the States should be exercised over them, the same as over any other property, which by reason of

its nature and the manner in which it is handled has become the means of fraud and imposition upon the public. The police power is put forth to regulate this class of property, not because of any hostility to patent rights, but because universal experience has proven that they have become the means or the excuse for perpetrating great frauds upon the public, and the hand of the Government can give to them no greater immunity than any other class of property.

In *Webber v. Virginia*, 103 U. S. 344, this Court said:

> "Congress never intended that the patent laws should displace the police powers of the States, that is, those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State of all property within its limits."
>
> *Webber v. Virginia*, 103 U. S. 344.

The Court in *Reeves v. Corning*, 51 Fed. 783, in an able opinion upholds the right to regulate the sale of patent rights, but in a *dictum* affirms the soundness of the previous opinion by the same court—*Castle v. Hutchinson*, 25 Fed. 394—on the ground that the section requiring the vendor of a patent right on credit, as in the case at bar, to indicate upon the face of the notes "Given for a patent right" is an unjust and unauthorized discrimination.

This, we respectfully submit, is the only ground, if at all, upon which this class of legislation can be overcome.

It is well known to all, who have had any experience in business, that the traffic in patented articles and patent rights embracing those of an insignificant nature, such as washing fluids, churns, clocks, as well as the more collossal schemes, such as hedge fences, etc., has become one of the most prolific means of frauds, of any other. Many, if not all of the States have passed statutes for the protection of the people against such frauds. This is but the exercise of the police regulations, which none but the State can exercise. No discrimination is made against the individual. The statutes simply apply to all who belong to a certain class. Many if not the most of whom are mere tramp venders of patent rights or patented articles. Both reason and experience prove the wisdom of this classification. The classification is not arbitrary or unreasonable, such as was attempted in *Connally v. The Union Sewer Pipe Co.*, 184 U. S. 540.

The language of this Court in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 293, is in point. The court said:

> "The clause of the 14th amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that

it 'only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax. Cases,* 115 U. S. 321. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privilege conferred and the liabilities imposed. *Hayes v. Missouri,* 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition when connected with the facts of the cases in which they are employed; with these four illustrations it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County v. Kimball,* 102 U. S. 704, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say

that hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity.'

"The rule therefore is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscrimination on persons merely as such, but on persons according to their relation. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B (*Missouri P. Ry. Co. v. Mackey*, 127 U. S. 205) to a different measure of damages than B (*Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26), and it permits special legislation in all its varieties. *Missouri P. Ry. Co. v. Mackey*, 127 U. S. 205; *Minneapolis St. L. Ry. Co. v. Henick*, 127 U. S. 210; *Duncan v. Missouri*, 152 U. S. 377. In other words the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the consti-

tutional prohibition,' said Mr. Justice Bradley in *Bells Gap R'd v. Pennsylvania*, 134 U. S. 232, 240.

"And Mr. Justice Brewer in *Gulf, Colorado & Sante Fe Ry. Co. v. Ellis*, 165 U. S. 150, after a careful consideration of many cases said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the inequality clause of the 14th amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable grounds; some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

And after giving many illustrations of the test of reasonableness, the court said:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there can not be an exact exclusion or inclusion of persons and things."

St. L., I. M. & S. Ry. v. Paul, 173 U. S. 404.

A., T. & S. F. R. R. Co. v. Mathews, 174 U. S. 96.

Fidelity Mut. Lf. Ass'n v. Mettler, 185 U. S. 308.

M., K. & T. Ry. v. May, 194 U. S. 267.

In *M., K. & T. Ry. Co. v. May*, 194 U. S. 267-269, which was for a penalty against the railway company, under a statute of Texas that required the railway companies to keep down the Johnson grass and Russian thistle on their rights of way, but did not require the same of farmers and others. This Court sustaining the statute said: "It is admitted that Johnson grass is a menace to crops, that it is promulgated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admited also that legislation may be directed against a class when any fair ground for discrimination exists. But it is said that this particular subjection of railroad companies to liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of the line which has to be worked out between cases differing in degree, with regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch v. Maryland*, 4 Wheat. 316, 4 Law Ed. 579. When a State Legislature has declared that, in its opinion, policy requires a certain measure, its action should not be dis-

turbed by the Courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

There is nothing which would prohibit the State from abolishing or modifying the laws as to negotiable instruments—as was the case at an early day in Arkansas. (Rev. Statutes of Ark. 1838, chap. 11, sec. 3.) And if it is necessary in order to protect the people of the different States from fraud on account of this class of property there is no reason why the law as to negotiable instruments should not be abolished or modified as to such.

If it were necessary to do the same as to any class of money lenders, pawnbrokers, building and loan associations, corporations, either foreign or domestic, or other class in order to prevent fraud, there would be full authority to uphold such legislation.

This legislation does not refuse to the vendor of patent rights or patented articles the right to collect the purchase money for the same. He may sue for and recover the price, notwithstanding the notes may be void. The validity of the sale is not affected by the statute. *Roth v. Merchants & Planters Bank*, 70 Ark. 200.

This is not like the case of a national bank, whose duties and whose every act is subject to the supervision and control of the United States Government. Every safeguard against fraud and imposition is thrown around the bank.

All that the United States Government does with reference to a patent right is to say to the patentee, "You have the exclusive right to enjoy the benefits of this patent without competition, if you sell the patent right or the right to any territory, that must be done in writing and the purchaser must file the assignment in the Patent Office if he wishes protection against a subsequent sale to an innocent purchaser for value." No supervision over the matter is assumed or attempted by the Government, and when the government has secured to the patentee the exclusive right to the patent as defined by Justice Miller, the object of the Constitution and laws of the United States is accomplished as to that, and he takes and holds it as he would any other property, and subject to all the rights of the States to enact such laws as are necessary for the protection of the public from fraud or imposition by reason of the patent rights or patented articles.

Respectfully submitted,

JOHN FLETCHER,

Attorney for Defendant in Error.

W. C. RATCLIFFE,

of Counsel.

See p. 7 for opinion in 102.

Supreme Court of the United States.

No. 99.—October Term, 1906.

E. L. Allen, and Wallace B. Allen, Administrator of the Estate of Erasmus W. Allen, Deceased, Plaintiffs in Error, *vs.* Frances J. Riley. | In error to the Supreme Court of the State of Kansas.

[December 3, 1906.]

Frances J. Riley, the defendant in error, who was plaintiff below, recovered a judgmen. against plaintiffs in error, defendants below, for $1,250, in the District Court of Brown County, in the State of Kansas, which judgment was affirmed by the Supreme Court of the State, and the defendants below have brought the case here by writ of error.

The suit was commenced by the filing of a petition by defendant in error, plaintiff below, in a District Court of Kansas, March 17, 1902, to recover the value of certain lands alleged to have been transferred by the plaintiff to the defendant Erasmus W. Allen, in part payment for the transfer to plaintiff of rights for the State of Kentucky under a patent dated January 30, 1901, for a washing machine. The right to recover is based upon the failure of the defendants to comply with the Kansas statute, which failure defendants do not deny, but they insist that the statute is void as being in violation of the Constitution of the United States and the act of Congress referred to in the opinion. The Kansas statute is chapter 182 of the Laws of 1889. A copy of the act is set out in the margin.*

*Chapter 182, Laws of 1889, (paragraphs 4356, 4357 and 4358, General Statutes of Kansas, 1901), reads as follows:

"Sec. 1. It shall be unlawful for any person to sell or barter or offer to sell or barter any patent right, or any right which such person shall allege to be a patent right, in any county within this State, without first filing with the clerk of the District Court of such county copies of the letters patent duly authenticated, and at the same time swearing or affirming to an affidavit before such clerk that such letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented; which affidavit shall also set forth his name, age, occupation and residence; and if an agent, the name, occupation and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person on demand.

"Sec. 2. Any person who may take any obligation in writing for which any patent right, or right claimed by him or her to be a patent right, shall form a whole

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The sole question for our determination in this case is concerning the constitutionality of the Kansas act. The opinion of the Supreme Court of the State of Kansas is reported in 71 Kans. and 80 Pac. Rep. 962.

The judgment herein is founded upon *Mason* v. *McLeod*, (57 Kans. 105,) which case has been followed by that of *Pinney* v. *First National Bank of Concordia*, (68 Kans. 223.)

The defendants insist that the act in question violates article one, section 8, of the Constitution of the United States, and the Federal statute passed in pursuance thereof, being R. S. sec. 4898; 3 Comp. Stat. p. 3387. The Constitution grants to Congress the right "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;" and section 4898 of the Revised Statutes provides that every patent or interest therein shall be assignable in law by an instrument in writing, which assignment is made void against any subsequent purchaser or mortgagee, for a valuabe consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.

It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provision quoted above, and that any regulations whatever, by any State authority in regard to such assignment or sale, and making provision in respect to them, are illegal.

The Supreme Court of Kansas has maintained and upheld the Kansas act on the ground that the statute is simply a reasonable and proper exercise of the police power of the State in regard to the subject of the act. (*Mason* v. *McLeod*, *supra*.) That court was of opinion that the provisions of the Kansas statute did not trench upon the Federal power nor interfere

---

or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words, 'Given for a patent right.'

"SEC. 3. Any person who shall sell or barter or offer to sell or barter within this State, or shall take any obligation or promise in writing for a patent right, or for what he may call a patent right, without complying with the requirements of this act, or shall refuse to exhibit the certificate when demanded, shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined in any sum not exceeding one thousand dollars, or be imprisoned in the jail of the proper county not more than six months, at the discretion of the court or jury trying the same, and shall be liable to the party injured in a civil action for any damages sustained."

with the rights secured to patentees by Federal law. The opinion does not assert that a State statute can interfere with the right of a patentee to sell or assign his patent, nor that it can take away any essential feature of his exclusive right, but, as is stated, the provisions in the act have no such purpose or effect; that "they are in the nature of police regulations designed for the protection of the people against imposition and fraud. There is great opportunity for fraud and imposition in the transfer of intangible property, such as exists in a patent right, and many of the States have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property." Many authorities are cited, and the opinion then continues: "The doctrine of these cases is that the patent laws do not prevent the State from enacting police regulations for the protection and security of its citizens, and that regulations like ours, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights or own patent rights to sell, should be upheld. We think the statute is valid."

In Indiana a statute, which is like that in Kansas, has been upheld by the Supreme Court of that State. (*Brechbill* v. *Randall*, 102 Ind. 528.) That case has since that time been followed in Indiana. (*New* v. *Walker*, 108 Ind. 365.) In Ohio a statute somewhat similar to the one in question has been upheld. (*Tod* v. *Wick Bros. & Co.*, 36 Ohio, 370.) And the same result has been reached in Pennsylvania. (*Haskell* v. *Jones*, 86 Penn. St. 173.) In *Herdic* v. *Roessler*, (109 N. Y. 127,) the validity of the same kind of a statute has been upheld. See also *Wyatt* v. *Wallace*, (67 Ark. 575;) *State* v. *Cook*, (107 Tenn. 499.) The statutes in the different States are not all precisely like the Kansas law, but they make provisions in regard to the sale or assignment of rights under a patent, and sometimes in regard to notes given for their purchase, which cannot be upheld under the contention of plaintiffs in error herein, that all such provisions are in violation of or inconsistent with the laws of Congress on the subject. The courts of some other States, having like questions before them, have held their statutes void. (*Hollida* v. *Hunt*, 70 Ill. 109; *Cranson* v. *Smith*, 37 Mich. 309; *Wilch* v. *Phelps*, 14 Neb. 134; *State* v. *Lockwood*, 43 Wis. 405,) and some others.

The Circuit Court of Appeals of the Eighth Circuit, in *Ozan Lumber Co.* v. *Union County National Bank*, (145 Fed. Rep. 344,) has held a statute of Arkansas upon this same subject void, because of its discrimination between articles of property of the same class or character, based only on the fact that the property discriminated against was protected by a patent granted by the United States. In the opinion in the case, authorities upon the subject are cited and commented upon. Among the cases

cited are *Patterson* v. *Kentucky*, (97 U. S. 501,) and *Webber* v. *Virginia*, (103 U. S. 344.)

In *Patterson* v. *Kentucky, supra*, the owner of a patent right for an improved burning oil was convicted of the violation of a Kentucky statute by the sale of the oil covered by the patent. The owner claimed the right to sell such oil notwithstanding the statute, which provided a standard below which oil was regarded as dangerous for illuminating purposes and the sale of which was prohibited. It was admitted the patented oil did not come up to the State standard. This court held the conviction was right, and that the owner of the patent was not protected, by reason of his ownership, from liability under the State statute. That statute was held to be one passed in the legitimate exercise of the powers of the State over its purely domestic affairs, and it was said that it did not violate either the Constitution or laws of the United States, as when property protected by patent once comes into existence its use is subject to the control of the several States to the same extent as any other species of property.

Webber v. *Virgina, supra*, relates also to tangible property covered by a patent, and it was held that the patent did not exclude from the operation of the taxing or licensing law of the State the tangible property manufactured under a patent. It was said in that case that "Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to the inventors must be enjoyed in subordination to this general authority of the State over all property within its limits."

While these two cases do not cover the one now before us, because they refer to tangible property which has been manufactured and come into existence under a patent, and the case before us relates to provisions which are to accompany an assignment of intangible rights, growing out of a patent, yet the general power of the States to legislate in order to protect their citizens in their lives and property from fraud and deceit is recognized, not as being without limit, of course, but as being properly exercised in the cases named.

We think the State has the power, (certainly until Congress legislates upon the subject,) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act referred to.

In some of the cases holding such statutes void it is said that it is unfortunately true that many frauds are committed under color of patent rights, and that the patent laws are not so framed as to secure the public from being cheated by worthless inventions, but notwithstanding that they

hold statutes of the nature of the one under consideration to be void, as trenching upon the rights of the owner of a patent secured by the Constitution and laws of the United States.

To uphold this kind of a statute is by no means to authorize any State to impose terms which, possibly, in the language of Mr. Justice Davis, in *Ex parte Robinson* (2 Bliss. 309,) "would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the powers conferred upon Congress by the Constitution." Such a statute would not be a reasonable exercise of the powers of the State.

In Michigan the court, speaking through Mr. Justice Campbell, while holding the act under review in that case upon this subject invalid, (*Cranson* v. *Smith*, 37 Mich. 309,) said: "While we cannot but recognize the magnitude of an evil which has brought patents into popular discredit, and has provoked legislation in several States similar to that in Michigan, we can not on the other hand fail to see in these laws a plain and clear purpose to check the evil by hindering parties owning patents from dealing with them as they may deal with their other possessions." If there is a special evil, unusually frequent and easily perpetrated when parties are dealing in the sale of rights existing or claimed to exist under a patent, we do not see why a State may not, in the *bona fide* exercise of its powers, enact some special statutory provision which may tend to arrest such evil, and may omit to enact the same provision concerning the disposal of other property. There is no discrimination which can be properly so called against property in patent rights, exercised in such legislation. It is simply an attempt to protect the citizen against frauds and impositions which can be more readily perpetrated in such cases than in cases of the sale or assignment of ordinary property.

The act must be a reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various States the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute. The expense of filing copies of the patent and the making of affidavits in the various counties of the State in which the owner of the rights desired to deal with them is not so great in our judgment as to be regarded as oppressive or unreasonable, and we fail to

find any other part of the act which may be so regarded. Some fair latitude must be allowed the States in the exercise of their powers on this subject. It will not do to tie them up so carefully that they cannot move, unless the idea is that the States have positively no power whatever on the subject. This we do not believe, at any rate in the absence of Congressional legislation. The mere provision in the Federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the States to legislate on the subject themselves in a manner neither inconsistent with nor opposed to the Federal statute. We think the judgment is right, and it is

Affirmed.

Mr. Justice WHITE, with whom concurs Mr. Justice DAY, dissenting.

My brother Day and myself dissent. The reasons, however, which impel him are broader than those influencing me. In general terms the Kansas statute, which the court now upholds, compels one selling a patent right in any county of the State of Kansas to file with the clerk of such county an authenticated copy of the patent, together with an affidavit as to the genuineness of the patent, and as to other matters. The statute, moreover, exacts that where a note is given for the purchase price of a patent right, there shall be inserted in the note a statement that it is given for a patent right, presumably to deprive the note of the attributes of commercial paper. We both think that the requirements as to recording the patent and affidavit are void, because repugnant to the power delegated to Congress by the Constitution on the subject of patents, and because in conflict with the legislation of Congress on the same subject. And, for like reasons, my brother Day is also of the opinion that the provision is void which exacts an insertion in a note given for the sale of a patent right of the fact that it was given for such sale. This latter provision, in my opinion, the State had the power to make as a reasonable police regulation not repugnant to the authority as to patents delegated to Congress by the Constitution or the legislation which Congress has enacted in furtherance thereof.

No. 102.

John Woods & Sons, Plaintiffs in Error, *vs.* Frank Carl. } In error to the Supreme Court of the State of Arkansas.

[December 3, 1906.]

Mr. Justice PECKHAM delivered the opinion of the Court.

This action was brought in the proper court of the State of Arkansas by the plaintiffs in error to recover the amount of a promissory note, which was given by the defendant in error on the sale to him of a patented machine and of the right to the patent in the State of Arkansas. Before the maturity of the note it was indorsed by the payee and transferred to plaintiffs in error. The note was not executed as provided for by the statute of that State relating to the sale of rights under a patent. (Act of April 23, 1891, Kirby's Dig. sec. 513.) The section reads as follows:

"SEC. 513. Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void."

The defendant set up the violation of the statute as a defense. The verdict was for the defendant, and the judgment entered thereon having been affirmed by the Supreme Court, the plaintiffs have brought the case here by writ of error.

The sole question involved is the validity of the statute. The opinion of the Supreme Court of Arkansas is reported in Ark. . See also *Wyatt* v. *Wallace*, (57 Ark. 575;) *State* v. *Cook*, (107 Tenn. 499.) This case is governed by the immediately preceding one, although the statute of Arkansas renders the note void if given for a patent right if the note does not show on its face for what it was given. The difference is not so material as to call for a different decision. The judgment is

Affirmed.

Mr. Justice DAY dissents.